IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1130

PEDRO S. DEBORJA

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Pedro S. deBorja, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit filed in the above entitled case on 18 December, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion which apprears in Appendix A to this Petition,

JURISDICTION

The Judgment of the United States Court of Appeals sought to be reviewed was filed on 18 December, 1978. The jurisdiction of this Court is invoked under 28 U.S.C.

QUESTION PRESENTED

1. At trial, the following instruction was twice given to the Jury:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the Jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge, should reasonably expect to result from any act knowingly done or knowingly omitted by the accused.

Is this charge, which permits the Jurors to infer criminal intent in cases where they in fact entertain reasonable doubt, an unconstitutional shift of the persuasion burden that mandates reversal unless the government can establish its harmlessness beyond a reasonable doubt?

STATUTORY PROVISION INVOLVED

This case and the issue presented involves the statutory provision of Title 18, U.S.C. Section 1341:

" Whoever, having devised or intending

to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On August 12, 1976, the Grand Jury for the United States District Court for the District of Maryland handed up an indictment charging Petitioner, Dr. Pedro S. deBorja, with having violated 18 U.S.C., §§1341 and 1342 (Mail Fraud; Aiding and Abetting).

On August 4, 1977, trial of the case commenced before the Honorable Edward S. Northrop, Chief Judge, with a Jury. On August 17, 1977, the Jury returned verdicts of "guilty" on seventeen counts of the twenty-three count indictment; Petitioner was found "not guilty" on six counts.

On October 12, 1977, Petitioner,

Dr. Pedro S. deBorja, was sentenced for this conviction. Petitioner was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years as to each of the seventeen counts upon which he was convicted, the term of imprisonment as to each count to run concurrently, thus making for a total term of imprisonment of four years. It was further adjudged that Petitioner pay a fine of one thousand dollars as to each of the counts upon which he was convicted, thus making for a total of seventeen thousand dollars. It is from this conviction and sentence that Petitioner noted his Appeal to the United States Court of Appeals for the Fourth Circuit. His conviction having been affirmed, it is from that decision that Petitioner notes his timely request to this Honorable Court.

STATEMENT OF FACTS

Petitioner, Dr. Pedro S. deBorja, stands convicted of mail fraud, 18 U.S.C. §1341. The facts pertinent to the issue on appeal are few.

Dr. deBorja was, at least prior to conviction, a fairly prominent member of Baltimore's medical community. He had a diverse practice which included the treatment of victims of automobile accidents. Some of these patients were referred to Dr. deBorja by attorneys.

The government's theory at trial was that Dr. deBorja was a defrauder of insurance companies. Some former patients of the doctor testified for the government and there was testimony which tends to establish that the doctor submitted bills for patients he had not examined; that bills included charges for

visits not made, services not rendered, and medicines and prosthetic devises not supplied; and that the doctor exaggerated and falsified reports of injuries. All of this was disputed by evidence for the defense.

Uncontroverted, however, was the fact that Dr. deBorja had accepted as payment less than the full amount billed from most of the patients who testified for the government. The prosecution made much of this at trial, obviously since the doctor's seeming practice of accepting as payment less than the amount billed was consistent with the government's theory of a fraudulent scheme involving the doctor and the referring attorneys. Dr. deBorja acknowledged that he often accepted less than the full amount he was due, but denied fraudulent intent or knowledge. The doctor maintained, instead, that he had "cut" his bills only because he had known poverty himself and did not wish to take from those who could not afford to give.

At the close of trial the jury received its instructions, including the Mann charge on intent. After about twelve hours of deliberation, the jury asked to hear again the instructions on "intent and reasonable doubt." The request was granted and the jury returned to the courtroom. Once again the instructions the jurors heard included the Mann charge. When the jury returned to the courtroom again, later that night, it was with verdicts of guilty.

REASON FOR GRANTING THE WRIT

At trial, the following instruction was twice given to the Jury:

It is reasonable to infer that

> a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the Jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

This charge, which permits the Jurors to infer criminal intent in cases where they in fact entertain reasonable doubt, is an unconstitutional shift of the persuasion burden that mandates reversal unless the Government can establish its harmlessness beyond a reasonable doubt.

This instruction has been, to say the least, damned. The list of insults hurled at it include:

"a dangerous practice . . . to be employed, if at all, with caution"[1]

"condemned, prejudicial"[2]

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1 United States v. Littlebear, 531 F.2d 896, 898-99 (8th Cir. 1976); similarly, United States v. Diggs, 527 F. 2d 509, 515 (8th Cir. 1975).

2 United States v. Chiantese, 546 F. 2d 135, 137, vacated in part on other grounds and remanded to the panel, 560 F.2d 1244 (5th Cir. 1977).

"repeatedly criticized"[3]

"at best clumsy"[4]

"can amount to plain error"[5]

"a constitutional error"[6]

"now in severe doubt"[7]

"an invitation to reversal"[8]

"universally criticized"[9]

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3 Cohen v. United States, 378 F.2d 751, 755 (9th Cir. 1967)(footnote, citing cases, omitted).

4 United States v. Denton, 336 F.2d 735, 738 (6th Cir. 1964).

5 United States v. Wilkinson, 460 F.2d 725, 733 (5th Cir. 1972).

6 United States v. Robinson, 545 F.2d 301, 306 & n.7 (2d Cir. 1976).

7 United States v. Diggs, 527 F.2d 509, 514 (8th Cir. 1975)(quoting from E. Dewitt & C. Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS §13.06 & notes (2d ed. 1970).

8 Cohen v. United States, 378 F.2d 751, 755 (9th Cir. 1967).

9 United States v. Wilkinson, 460 F.2d 725, 733 (5th Cir. 1972).

"serves no useful purpose"[10]

"a violation of due process"[11]

Over twenty years ago, this charge was authored by Judge William C. Mathes, Federal District Judge for the Southern District of California. See Mathes, Some Suggested Forms for Use in Criminal Cases, 20 F.R.D. 231 (1957). The attitude of the author and his successors (Chief Judge Edward Devitt and Professor Charles Blackmar) towards the instruction has evolved over the years from recommendation, to defense, to doubt, to clear warning. See United States v. Chiantese, 560 F.2d 1244, 1249 n.2 (5th Cir. 1977)(en banc).

The instruction is known, of course, as the Mann charge, and it takes its name from the landmark case of Mann v. United States, 319 F.2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964). Dr. Nathan Mann was convicted of income tax evasion by a jury that had received, word for word, the identical instruction at issue here. Although Dr. Mann's attorney had not objected to the instruction at trial and although the Court of Appeals found the evidence sufficient for conviction, the Court reversed, holding the charge to be plain error:

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[10] Cohen v. United States, 378 F.2d 751, 755 (9th Cir. 1967); United States v. Barash, 365 F.2d 395, 402 (2d Cir. 1966)(Friendly, J.).

[11] United States v. Wilkinson, 460 F.2d 725, 734 (5th Cir. 1972).

> If the charge had ended when the Jury was told that a person is presumed [sic] to intend the natural consequences of his own acts, when considered in the light of the charge as a whole, there would have been no error. When the words, "So unless the contrary appears from the evidence" were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results.

319 F.2d at 409.

Mann also held that the charge conflicted with the presumption of innocence and was not cured by consideration of the instructions as a whole:

> Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that [leaving] the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent

one.

319 F.2d at 410.

"Mann is one of the most discussed, if not the most distinguished, cases" in its home circuit - the fifth. United States v. Chiantese, 560 F.2d at 1250 (footnote omitted). It has been "followed, distinguished, explained and qualified." United States v. Beasley, 513 F.2d 309, 314 (5th Cir. 1975).

In the fifteen years since the Mann decision "the case has never been overruled or criticized, yet the Mann-outlawed charge [continued to appear in the appellate court] regularly." United States v. Chiantese, 560 F.2d at 1250. In 1972, almost ten years after Mann, the Fifth Circuit Court of Appeals was still trying "to bury the use of . . . 'so unless the contrary appears' and to supplant the superceded but enduring book charge," id. at 1252. As the Court of Appeals was to discover, however, it was "[w]riting on water," id., as some panels of the court displayed a seeming desire to hold Mann-errors (then considered a non-constitutional matter) harmless. See generally id. at 1252-55.

By 1977, John Brown, Chief Judge of the Fifth Circuit Court of Appeals, had had enough:

> Probably no other jury instruction has received so much attention and repeated condemnation in this Circuit. Despite our emphatic disapproval in a series of cases, this serpent rears its head once again. This charge is so infamous that in the standard text on federal jury instruction its use is referred to as an "invitation to reversible error." [W]e have preached, and we assumed that the district courts have read our opinions, but as with the boy who yelled wolf too often, our warnings have gone unheeded. We have made efforts to drown, destroy and inter [other charges] with similar lack of success. After all of this preaching and admonitions we conclude that this case should be the vehicle to bury the condemned, prejudicial charge once and for all. And the way to do it is to reverse the case without adding to the confusion, or worse, [extending] an invitation to trial judges to flirt with its use in the hope that we will find some extenuation in the use accompanied by some high sounding, but unheeded, pontifical platitudes [so] that surely never again will it be employed. . . . The Mann charge is not - the word is not - to be used, and no one, prosecutor or judge, can hope to be resuscitated.

United States v. Chiantese, 546 F.2d 135, 136, 137 (5th Cir.), vacated in part and remanded to the panel, 560 F.2d 1244 (1977) (quoting from E. Devitt & C. Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS §13.06 at 277 (2d ed. 1970); footnote omitted).

Chiantese's "stringent therapy of automatic reversal" was probably the cause of the Fifth Circuit's decision to rehear the case en banc. See 560 F.2d at 1256 (Brown, C. J., concurring). Automatic reversal is, after all, generally reserved for violations of only those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless." Chapman v.

California, 386 U.S. 18, 22 (1967). Thus, most types of constitutional error, though plain, can under some limited circumstances be said to be harmless beyond a reasonable doubt. See, e.g., Harrington v. California, 395 U.S. 250 (1969)(overwhelming untainted evidence of guilt). In any event, the Court of Appeals, sitting en banc, vacated that portion of its earlier opinion which had called for automatic reversal. In all other respects, though, the en banc opinion further strengthened the Court's condemnation of the Mann charge:

> [F]or over fourteen years . . . hortatory words and dire predictions have availed us nought but more appeals.
>
> In the light of this history of wasted judicial resources and ineffective communication, a majority of the Court en banc has determined that directory action of a supervisory nature must supplant the more normal adjudicatory process if we are to elimate this chronic issue. We therefore direct that in all trials commenced 90 days after the date of this opinion:
>
> 1. No District Court in this Circuit shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence. This includes charges such as:
>
> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.
>
> 2. The error in giving such a burden-shifting charge will not be absolved because other phrases defining the proper burden of proof are included in the instructions, no matter how often such corrective phrases are repeated. This Court no longer will harmonize inconsistent charges to effect the cure of a charge in violation of paragraph 1.

560 F.2d at 1255 (emphasis by the court). The court then re-emphasized that although Mann-errors would "not automatically produce reversal," the weighing of the harm of the error in the context of each case where it occurs "shall not include consideration of whether a defective charge has been cured by prior or subsequent statements." Id. (emphasis added).

The en banc decision of the Fifth Circuit in Chiantese was very recently followed by the United States Court of Appeals for the Third Circuit, which had never before considered the propriety of the Mann charge. United States v. Garrett, 23 Crim. L. Rep. 2138 (3d Cir. Mar. 28, 1978). Although the Court in Garrett examined the instructions as a whole and found the harmful effect of the Mann charge had in that case been vitiated, its conclusion is strikingly similar to that reached by the Fifth Circuit:

> [T]he confusing nature of the instruction's language and the extent of judicial time spent reviewing charges containing the Mann instruction convinces us to prohibit its use in criminal trials commenced ninety days after the filing of this opinion. Hereafter, District Court in this Circuit shall not use language in instructions that reasonably can be interpreted as shifting the burden to the accused to produce proof of innocence . . . . Use of [the Mann instruction] will be deemed error, and convictions obtained in trials in which the instruction is given will be reversed, except in those very extraordinary circumstances [in which] the error may be found so inconsequential as to avoid the necessity of reversal on appeal.

Id. (citation omitted).

Despite the strong language of both Garrett and Chiantese there are, admittedly, indications that the driving force behind these decisions was a desire for judicial economy rather than a concern for individual constitutional rights. Indeed, the largely prospective nature of the decisions indicates that perhaps the Courts never examined the issue in a constitutional light at all.

The constitutional infirmities of the Mann charge have, however, been pinpointed. The United States Court of Appeals for the Second Circuit, in a perceptive opinion, has applied the teachings of Mullaney v. Wilbur 421 U.S. 684 (1975), to the question at hand, concluding that rejection of the Mann charge is not only desirable, but constitutionally required as well. United States v. Robinson,

545 F.2d 301 (2d Cir. 1976).

Mullaney, of course, struck down as unconstitutional a Maine procedure whereby a jury instruction cast in presumptive terms served to shift onto the defendant the persuasion burden as to malice, an essential element of the crime involved. It should be obvious that the "inference" that a person intends the natural and probable consequences of his acts if the doctrinal twin of the "presumption" of malice struck down in Mullaney. Indeed, the latter follows logically from the former. "The reasoning [behind the presumption of malice] proceeded on the view that a man was deemed to intend the natural consequences of his acts." G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 72-73 (1965). It follows, then, that any instruction, whether framed in terms of inferences or presumptions, that can reasonably be understood by the jury to place the persuasion burden upon the defendant as to an essential element of the crime is unconstitutional under Mullaney, and that a conviction obtained with the aid of such an instruction must be reversed unless the reviewing court can "declare a belief that [the federal constitutional error] was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

This was the approach taken by the Second Circuit in United States v. Robinson, 545 F.2d 301 (2d Cir. 1976). Robinson was convicted of violations of 18 U.S.C. §495, an essential element of which is specific intent to defraud. The trial court's use of the Mann charge in instructing the jury on intent was held erroneous, and Robinson's convictions were reversed. The Court of Appeals rejected at the outset the government's contention "that the charge was 'entirely correct'," id. at 305 (footnote omitted), but noted that

because defense counsel had not objected to the charge at trial "an analysis of the nature of the error inherent in the 'natural and probable consequences' charge is necessary." Id.

The Court then proceeded to summarize what it termed the "objectionable nature of the charge":

> "The jury may mistakenly believe that it is permissible to infer specific knowledge or intent solely from the doing of a particular act, without regard to the totality of circumstances; or that the occurrence of the particular act shifts the burden of proof of knowledge or intent from the prosecution to the defense; or that the question is whether a reasonable man in similar circumstances would have had the requisite knowledge or intent, rather than whether the accused actually had it."
>
> Thus, the "natural and probable consequences" charge, particularly when, as here, it contains the phrase "unless the contrary appears from the evidence," is a burden-shifting charge which has the potential for misleading the jury with respect to the requirement that the government must prove every element of an offense beyond a reasonable doubt.

United States v. Robinson, 545 F.2d at 305-06 (quoting, in part, from Cohen v. United States, 378 F.2d 751, 755 (9th Cir.), cert. denied, 389 U.S. 897 (1967); other citations omitted).

Next the Court discussed the Supreme Court decision in Mullaney v. Wilbur, 421 U.S. 684 (1975), and concluded that "under Mullaney

the error inherent in the 'natural and probable consequences' charge takes on a constitutional dimension, and must be judged accordingly." 545 F.2d at 306 (footnote omitted). The Court distinguished its own case of United States v. Erb, 543 F.2d 438 (2d Cir. 1976), on the ground that "[t]he erroneous instruction in Erb did not rise to the level of a constitutional error" due, at least in part, to the fact that the "instruction [in Erb] did not contain the phrase 'unless the contrary appears from the evidence'." 545 F.2d at 306 n.7.

It was this "unless the contrary" language that drew the most fire from the Second Circuit, the Court making it clear once again that "[t]his phrase magnifies the error in the 'natural and probable consequences' charge, for . . . the contrary evidence to which it refers is 'presumably evidence the defense would have to present'." Id. at 307 n.7 (quoting Friendly, J. in United States v. Barash, 365 F.2d 395, 402 (2d Cir. 1966)).

The Second Circuit's emphasis on the "unless the contrary" language is significant in that it spotlights the constitutionally fatal shortcomings of the Mann instruction. The basic problem with the "unless the contrary" language can be best understood by analyzing a misconception of that language expressed by a minority of the judges on the Fifth Circuit Court of Appeals, namely, that the "condemned admonition" is not prejudicial at all but is, rather, "a cautionary instruction intended for the benefit and protection of the defendant." United States v. Chiantese, 560 F.2d at 1258 (Hill, J., specially concurring); see 560 F.2d at 1259 (Ainsworth, J., dissenting). Judges Hill and Ainsworth are partially correct; the instruction, if heeded, would, for example, prevent the jury from inferring criminal intent in a case where the

evidence established to its satisfaction that there was in fact no such intent. But the problem, indeed the constitutional infirmity, of such a "cautionary instruction" is that it does not go far enough. Intent is an essential element of the crime and, therefore, reasonable doubt on the issue of intent is all that is needed for a verdict of acquittal. Thus it is not necessary that the "contrary appear from the evidence" for the jury to be precluded from inferring intent: an appearance of reasonable doubt is enough to do so. The phrase "appears from the evidence" is admittedly ambiguous, but a reasonable construction of the words suggests a preponderance test. Thus where, as here, the question is polar (intent vs. no intent) the answer which appears to the jury to be more likely is the one that "appears from the evidence." Petitioner was constitutionally entitled not merely to a jury instructed to refrain from inferring criminal intent if it thought it more likely than not that Petitioner had no such intent; rather, Petitioner was entitled to a jury clearly informed that it must refrain from inferring criminal intent if it had any reasonable doubt as to such intent. Such a jury Petitioner did not receive.

Eleven years ago this Court declined to reverse convictions in a case where the jury had been given an instruction* substantially identical to the one questioned here. United States v. Wilkins, 385 F.2d 465 (4th Cir. 1967)(Boreman, J.). The opinion in Wilkins appears to be not an approval of the Mann charge in general but rather a finding that the "charge as a whole" did "not constitute

*Coincidentally, the charge was repeated to the jury there as well. 385 F.2d at 475.

prejucicial error" in that specific case. 385 F.2d at 474. Moreover, that the panel in Wilkins did not consider the constitutional infirmities of the Mann charge seems apparent both from the opinion itself e.g., id. ("We are not inclined to reverse the convictions . . . because of asserted errors in instruction, particularly since no objection was interposed at trial . . . . ") and from the fact that on February 9, 1967, when Wilkins was argued, the United States Supreme Court had not yet decided Chapman, Winship, or Mullaney.

Although the Wilkins panel noted some of the criticism that had been leveled against the Mann charge, its use in that particular case was not held erroneous, the Court basing its decision on three separate grounds.

The first justification announced for allowing the Mann charge in Wilkins was that a "substantially similar instruction is favorably regarded by the writer of a manual of instructions employed by many federal Judges." 385 F.2d at 473 (footnote omitted). It could probably go without saying that the expressed attitude of this manual toward the Mann charge is today, and has been for some years, one of apology and warning.

Second, the fact that the Ninth Circuit had then recently "approved" the Mann charge was noted. 385 F.2d at 473 (citing Sherwood v. United States, 320 F.2d 137, 148-57 (9th Cir. 1963). Today, however, the precedential value of Ninth Circuit cases such as Sherwood is doubtful. See United States v. Jenkins, 567 F.2d 896, 897 n.1 (9th Cir. 1978)(per curiam). Moreover, in view of Mullaney, the likelihood of any United States Circuit Court of Appeals now "approving" the Mann charge seems infinitesimal. See United

States v. Robinson, 545 F.2d 301 (2d Cir. 1976).

Third, the charge was found fair "as a whole," great weight being given to the fact that the jury was otherwise properly charged on reasonable doubt and the burden of proof. Today, however, federal courts are showing an increasing reluctance to regard burden-shifting charges as cured by the inclusion of general cautionary language or, indeed, by the inclusion of specific instructions directly contradicting the erroneous charge. See, e.g., United States v. Alston, 551 F.2d 315, 316 (D.C. Cir. 1976)(Bazelon, C.J.); Wright v. Smith, 434 F. Supp. 339, 348 (W.D.N.Y. 1977) (Curtin, C.J.); cf. United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977)(single misstatement of elements of the crime held ground for reversal and termed "not an isolated inaccuracy"). This trend is surely attributable to a growing awareness that an "[e]rroneous allocation of the burden of proof is . . . an error of constitutional diminsion," United States v. Scott, 529 F.2d 338, 340 (D.C. Cir. 1975), and that instructional errors of constitutional dimension must pass muster under the "exacting test" of Chapman v. California. United States v. Heyman, 562 F.2d at 318.

In this regard, the habeas corpus case of Wright v. Smith, 434 F. Supp. 339 (W.D.N.Y. 1977), is instructive. The issue in Wright was the propriety of a charge which contained a burden-shifting alibi instruction surrounded by numerous other instructions cautioning the jury that the defendant was presumed innocent; that the burden of proving the defendant guilty remained on the prosecution throughout the trial; that this prosecutorial burden extended to every element of the crime; that the burden never shifted to the defendant;

that the defendant had no burden at all, either to disprove his guilt or to prove his innocence; and so forth. Some of these cautionary instructions were repeated as least seven times during the trial court's charge to the jury. See 434 F.Supp. at 345 n.2. Indeed, Chief Judge Curtin noted that his "review of the trial court's full instruction indicates that, in most respects, it was a fair and accurate summary of the standards which the jury must apply to the evidence during the course of its deliberation." Id. at 345.

Nonetheless, the Chief Judge concluded that

> The constitutional infirmities [of the burden-shifting charge] were not cured by the more general language which appears in the course of the charge that the burden of proof never shifts from the Government to the defendant and that the Government must bear the burden of persuasion on all issues raised at trial.
>
> This instruction gave the jury a choice between applying two conflicting burdens of persuasion. Reasonable minds could infer from this instruction that the defendant still had the burden . . ., even though the instruction does state at several points that the burden remains with the [prosecution] to prove the "crime as a whole.". . . It is fundamental to our system of justice that instructions to the jury must be consistent with each other and not misleading to the jurors.

Id. at 348 (citations omitted). See Stump v. Bennett, 398 F.2d 111, 122 (8th Cir.), cert.

denied, 393 U.S. 1001 (1968)("If inconsistent meanings are conveyed by the instruction, whereby a jury could derive an erroneous understanding of the burden, it is difficult to reason that a reasonable doubt does not exist as to the prejudice involved.").

To similar effect is the Fourth Circuit case of United States v. Heyman, 562 F.2d 316 (4th Cir. 1977), which involved an instruction that erred in describing an element of the crime, rather than in explaining how the element is proved. Defendants in Heyman were convicted of an obscenity-related offense, 18 U.S.C. §1461. Their convictions were reversed on appeal, this Court holding that the trial court's erroneous difinition of obscenity was not harmless beyond a reasonable doubt. See 562 F.2d at 319. Although noting that the definition had been given incorrectly once but correctly twice, and although clearly following "the familiar rule that the charge must be considered as a whole," this Court expressed its belief "that the government's submission does not satisfy [the] exacting test" of Chapman v. California, 386 U.S. 18, 24 (1967).

The reasoning in Heyman seems significant. This Court stressed the fact that the error occurred when the trial judge told the jury how it should apply the definition of obscenity to the facts of the case, and that the error, though it occurred but once, "was not an isolated inaccuracy. Through its faulty explanation, it infected the correct definition that had been given previously." 562 F.2d at 318. Here, the error occurred when the judge instructed the jury on how it was to determine the issue of intent, an essential element of the crime. Surely this is just as crucial an area of instruction as that involved in Heyman and, just as

surely, its potential for infecting the other parts of the charge is equally as great.

As further support for its decision in Heyman this Court noted that the trial judge "emphasized that the jury was 'duty bound to follow the law as stated in the instruction and to apply that law to the facts.'" 562 F.2d at 318. Here the same emphasis was laid by the trial court and here, as there, the error was a misstatement of law. In Heyman, this Court concluded the point as follows: "The error involved a statement of the law, and there is no basis for the government's speculation that the jury disregarded the judge's instructions to apply the law as explained in the charge." Id.; cf. United States v. Mogavero, 521 F.2d 625 (4th Cir. 1975)(rejecting government's argument that instruction allowing jury to place persuasion burden on defendant was cured by repeated instructions that prosecution had to prove every element beyond a reasonable doubt; reasoning similar to Heyman but convictions reversed on non-constitutional grounds).

In United States v. Arthur, 544 F.2d 730 (4th Cir. 1976), an instruction even more egregiously burden-shifting than the one at issue here was deemed erroneous. This Court noted that "[a]n instruction that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his voluntary acts has generally been held proper. . . . Id. at 737 (emphasis by the court)(citing United States v. Trexler, 474 F.2d 369 (5th Cir.), cert. denied, 412 U.S. 929 (1973) and United States v. Wilkinson, 460 F.2d 725 (5th Cir. 1972)). Although the "unless the contrary" language was not involved in Arthur, the choice by this Court of Trexler and Wilkinson as authority seems significant: the charge recommended by the

Wilkinson court, and quoted with apparent approval by this Court, deliberately and specifically omits the "unless the contrary appears" language. See 460 F.2d at 733-34. Moreover, the Wilkinson court bitterly criticized the Mann charge, see notes 5, 9, 11, supra. See also United States v. Trexler, 474 F.2d at 371 (following Wilkinson).

Writing for the District of Columbia Court of Appeals, Chief Judge David Bazelon has also subjected the potentially burden-shifting charge problem to a Winship-Mullaney-Chapman analysis. United States v. Alston, 551 F.2d 315 (D.C. Cir. 1976). In Alston, the Court was confronted with a charge that contained both an instruction which may have tended to shift the persuasion burden as to alibi, and the usual boiler-plate on the government's burden of proof beyond a reasonable doubt, the presumption of innocence, and the fact that the defendant need not prove anything nor present any evidence. Chief Judge Bazelon, obviously treating the error as both plain and constitutional, see id. at 316 & n.9, 319 & n.21, held that the convictions must be reversed:

> The fundamental principle that serious doubts as to whether a defendant was prejudiced by trial defects should be resolved in the defendant's favor compels reversal here. It may be argued that we should overlook minor variations from standard instructions because jurors do not pay much attention to instructions anyway. Counsel's failure to object, the argument runs, further supports this view.
>
> It would be to abdicate our responsibility to ensure the fair administration of criminal justice

> to conjecture that jurors do not heed instructions, or to find error non-prejudicial solely because of counsel's silence. An instruction central to the determination of guilt or innocence may be fatally tainted by even a minor variation which tends to create ambiguity. In such circumstances, the record must provide . . . assurance that defendant has suffered no harm . . . . equivocal direction to the jury on a basic issue."

551 F.2d at 321 (footnotes omitted).

Significantly, these cases do not represent a departure from the generally accepted rule that the adequacy of a charge will be tested by examining the charge as a whole, see, e.g., United States v. Bennett, 364 F. 2d 77 (4th Cir. 1966). Rather, they illustrate the difficulties inherent in determining beyond a reasonable doubt that a charge, unconstitutional in part, is harmless as a whole. Even the en banc decision of the Fifth Circuit Court of Appeals in Chiantese, which made clear that an unconstitutional instruction allowing the jury to shift the burden of proof will not be saved by curative boiler-plate "no matter how often such corrective phrases are repeated," 560 F.2d at 1255, need not be viewed as an exception to the general rule. Instead, the position taken by the Fifth Circuit seems to be a common-sense recognition that a reviewing court cannot in good faith hold harmless specific instructional errors of constitutional magnitude on the ground that such error was "accompanied by some high sounding, but [possibly] unheeded, pontifical platitudes." United States v. Chiantese, 545 F.2d at 137.

Indeed, in light of the reasonable doubt standard used in reviewing constitutional errors at trial, it seems almost ludicrous to suggest that correct statements as to burden of proof can "cure" incorrect and unconstitutional misstatements as to the burden: that is, it is reasonably possible that the jury, in attempting to reconcile hopelessly conflicting instructions, would apply the incorrect portion of the charge, thus making "infection" equally likely as "cure." See, e.g., United States v. Pope, 561 F.2d 663, 671 (6th Cir. 1977)("The fact that one instruction is correct does not cure the error in giving another which is inconsistent with it.").

Boiler-plate instructions on the defendant's presumption of innocence and the prosecution's burden to prove the elements of the crime are notoriously ineffective in communicating to jurors their responsibilities in maintaining the integrity of our fact-finding system. See, e.g., sources cited in United States v. Alston, 551 F.2d at 320 n.21. Studies have shown, for example, that after being instructed upon the presumption of innocence the average juror has no real idea "who must prove what and by how much." See id.

The charge here contained many references to reasonable doubt, the government's burden, the Petitioner's absence of burden, and so forth. Whether these general, correct instructions "cured" the specific, incorrect, and unconstitutional Mann instruction or -- instead-- whether these correct charges were themselves "infected" is a matter of conjecture. "Assessing prejudice is an elusive task, requiring appellate judges to weigh the impact of trial defects on the minds of other people, not their own." United States v. Freemam, 514 F.2d 1314, 1315 (D.C. Cir. 1975). At any rate, the question here seems impossible to answer, one way or another,

with a degree of certainty that excludes all reasonable doubt. If this be true, Petitioner's conviction must be reversed.

Moreover, the court's charge as a whole reveals that the unconstitutional infirmities of the Mann charge were repeatedly aggravated by other, specific, instructions.

The first instruction from the trial judge was

> Although you, as Jurors, are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.
>
> Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

(App. 4,5). The Mann-error was an error of law, of constitutional dimension. This Court has recognized that the likelihood of a defendant's being harmed by such an error is increased by the giving of an instruction such as the one quoted above. See United States v. Heyman, 562 F.2d at 318.

Moments later, the trial court told the jury that

> An inference is a deduction or conclusion which reason and common sense would lead you to draw from facts

> which have been proved.
>
> A presumption is a conslusion which the law requires you to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but, unless so outweighed, you, the Jury, are bound to find in accordance with the presumption.

(App. 8). If this was intended to differentiate between a constitutionally inoffensive permissive inference of fact and a constitutionally prohibited presumption of law, it probably failed its purpose. Conspicuously missing her is any mention of the crucial difference between an inference and a presumption as defined by the court, viz., that the jury is never, under any circumstances, required to "find in accordance with" the inference. That the jurors should be expected to know the difference themselves is too much to expect -- even those who know the distinction best have erred, e.g., Perkins, A Rationale of Mens Rea, 52 HARV. L. REV. 905, 910 (1939).

It is difficult to understand why the trial judge defined "presumption" at all: the case involved no true presumptions for the jury to consider, and the authorities are agreed that the troublesome term "presumption" should be kept from the jury whenever possible. See generally Evans v. State, 28 Md. App. 640, 349 A.2d 300, 323-27 (1975) (Moylan, J.). At any rate, in view of the fact that the trial judge's one-sentence definition of "inference" seems to blend into the more extensive discussion of presumption that followed, and that the trial judge used the terms in tandem elsewhere in the charge (e.g., App.), it seems reasonably

possible that the jury applied notions gleaned from the "presumption" instruction to the "inference" language of the Mann charge. This, of course, would have been harmful, and the likelihood of its having happened was increased by the strong similarity between the "convincing evidence to the contrary" language of the "presumption" instruciton and the "unless the contrary appears" language of the Mann charge.

In a technically accurate but potentially misleading instruction the jury was told

> Fraudulent intent is one of the essential elements of the offenses with which the defendant is charged. Fraudulent intent is not presumed or assumed; it is personal and not imputed. One is chargeable with his own personal intent, not the intent of some other person.

(App. 20). Fraudulent intent is truly not to be "presumed or assumed;" that the jury may be led to do so is the crucial infirmity of the Mann charge. The problem with the above-quoted instruction, though, is that this accurate statement of the law may have been lost in the shuffle. From the context the jurors could have reasonably understood the judge's proscription against presuming intent to mean merely that they were not to attribute to Petitioner the intent of another. This seems especially so because the liability of Petitioner for the acts of others was an issue at trial.

Immediately after giving the Mann charge the judge told the jury that

> Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only

> to the state of mind with which the act is done or omitted.

(App.). The recent case of United States v. Schilleci, 545 F.2d 519 (5th Cir. 1977), is instructive. In Schilleci, as here, "the hinge-pin of the defendant's case was his lack of specific intent," id. at 525. The Court of Appeals noted that although the jury had been correctly instructed that the burden of proof is on the government the error of giving the Mann charge was not cured. Moreover, the Court stressed that the Mann-error was, if anything, aggravated by its context, since "[t]he charge used by the trial judge following the Mann language dealt with the difference between motive and intent." Id. at 525-26.

Another instructive case is United States v. Moore, 435 F.2d 113 (D.C. Cir. 1970)(per curiam). Moore involved a charge not nearly so burden-shifting as the one here, see id. at 114, and was decided at a time when burden-shifting questions were not generally subjected to constitutional analysis. Although stating that "[i]n a specific intent case, [even] a charge that a person ordinarily intends the natural and probable consequences of his acts may be misleading," id. at 116, the Court affirmed. In support of its decision, the Court noted that the instructions as a whole contained "at least three references to the requirement of knowledge [and that] seems enough to correct any misimpression resulting from the natural-and-probable-consequences instruction." Id. at 116 n.5.

Here too, the trial court spoke repeatedly to the jury of the knowledge requirement. Moments after giving the Mann charge the trial judge said that

> Like intent, knowledge ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a defendant's knowledge from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

(App.). This instruction did not cure the error of giving the Mann charge -- it compounded it. The jury was told that knowledge was "[l]ike intent" and that it could be proved inferentially through a process similar to that described in reference to intent. Thus it is reasonably possible that the jury applied the Mann formula to the knowledge question as well. Far from "curing" the Mann-error, the jury's findings as to Petitioner's knowledge may themselves have been tainted.

Discussing the specific intent requirement once again, the trial judge instructed the jury that

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement or act made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate to you his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts

knowingly done or knowingly omitted.

(App.). Standing alone, this charge, omitting as it does the "unless the contrary" language, is constitutionally inoffensive. See United States v. Arthur, 544 F.2d at 737 (semble). The problem with it here, however, is that there is a reasonable possibility that the jury could have interpreted it as yet another reinforcement of the Mann charge.

On of the last instructions the jury received before beginning its deliberations was the following:

> You should not take the testimony of the prosecution alone, and, then, if that testimony indicates guilt, take up the testimony of the defense to ascertain where the defendant has proved himself to be not guilty.
> Rather, you should reserve your opinion upon the question of guilt or innocence until you have considered all of the evidence, not only that given for the prosecution, but also that given for the defense.

(App.)(emphasis added). Although it surely could not have been so intended by the trial judge, a reasonable (perhaps the most reasonable) construction of these words yields a translation something like this: Don't begin to try to find out where the defendant has proved himself to be not guilty until you have considered all of the evidence, at which time you should begin to try to find out.

The improper, burden-shifting nature of this instruction is obvious. Whether the instruction would itself be cause for reversal is a question that need not be reached, but

its inadequacy is apparent. Can it be doubted that such an instruction had a reasonable possibility of magnifying the harmful effects of the Mann charge?

After deliberating for about twelve hours the jury requested that the judge instruct them once again on the subjects of reasonable doubt and intent. The judge did so, repeating the Mann charge, as well as four of the other instructions quoted above.

Certainly this, if nothing else, raises a reasonable possibility that the burden-shifting Mann charge contributed to the verdict. "When the jury has zeroed in on a critical issue, accurate instructions take on maximum importance." United States v. Stephens, 23 Crim. L. Rep. 2138 (5th Cir. Mar. 24, 1978).

There are three basic rationales which have been advanced in those (increasingly unusual) cases where a conviction is affirmed in the face of a burden-shifting intent instruction. The first is that the particular charge, construed as whole, is not harmful. The recent constitutionalization of this area of criminal procedure, combined with an increasing awareness of the limited curative powers of reasonable-doubt boiler-plate, has sharply limited the sort of charge that can pass muster this way.

The second way Courts have found Mann-errors harmless is by stating criminal intent was admitted, or otherwise not in issue. See, e.g., United States v. Durham, 512 F.2d 1281 (5th Cir. 1975), where the Court went to some length attempting to demonstrate "that the real issue was what, if anything, Durham had done; intent could not have been the crucial issue in the case." Id. at 1288 (emphasis by the Court); cf. United States v. Wilkinson, 460

F.2d 725, 733 (5th Cir. 1972)("The government's case did not rest upon mere implications of evil motive, but was supported by affirmative evidence of that particular element of the alleged crime" -- "undisputed evidence that Wilkinson made admissions" of his fraud). Here Petitioner's intent, or lack of it, was a key issue at trial. Certainly the jury in its request for repeated instruction on intent seemed to think so.

Third, burden-shifting instructions (and most other trial errors of constitutional magnitude) have been held harmless where there is overwhelming untainted evidence of guilt. See, e.g., Harrington v. California, 395 U.S. 250 (1969); United States v. Alston, 551 F.2d 315, 320 n.24. (D.C. Cir. 1976). But see United States v. Diggs, 527 F.2d 509, 515 (8th Cir. 1975)("even where the government makes a strong case, the giving of an instruction containing the ['unless the contrary appears' language] is a dangerous practice").

The Fourth Circuit in its decision summarily dismissed the Petitioner's contentions herein and incredibly criticized the Court for giving the instruction but gave no thought whatsoever to the overwhelming shift of the burden of proof. It is an easy decision to forewarn the Court not to do this again and comment that the whole case involved only a credibility issue.

Nevertheless, by even eluding to same, the Court buttressed the Petitioner's argument by putting the Defendant in a position that he had to meet the burden of proof himself by combating the credibility issue. If perchance the Defendant had not elected to put on any defense, such inferences as given by the Court would indicate to the jury that the Defendant had not met his burden.

There can be no clearer Constitutional question of major importance wherein the Court has acquiesed to a proposition that this Defendant was "guilty until proven innocent." The Appellate Court further stated that the jury was not influenced by the charge. Such thinking is contra to all reasoned law and nothing more than utmost speculation. In this case the evidence of Petitioner's quilt is far from overwhelming.

CONCLUSION

Petitioner respectfully requests that this Honorable Court grant the requested Writ of Certiorari for the reasons discussed above.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 77-2553

UNITED STATES OF AMERICA,

Appellee,

v.

PEDRO S. DEBORJA,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Argued November 16, 1978 Decided December 18, 1978

Before HAYNSWORTH, Chief Judge, BUTZNER and RUSSELL, Circuit Judges.

PER CURIAM:

Pedro S. deBorja stands convicted on seventeen counts of mail fraud, 18 U.S.C. §1341. His sole claim upon appeal is that use of the Mann[1] charge in the jury instruc-

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[1] See Mann v. United States, 319 F.2d 404 (5th Cir. 1963). The charge used in deBorja's

tions placed the burden of proof upon him in violation of the Due Process Clause.

We disagree. If there was error in use of the Mann charge, we are not convinced the error rises to the level of a constitutional violation. And if a constitutional violation, we would still affirm here for the jury was not misled by the charge. The sole issue for determination was the credibility of the witnesses and not the defendant's intent.

We caution, however, that instructions similar to that given in deBorja's trial have been severely criticized. See generally, Devitt & Blackmar, 1 Federal Jury Practice & Instructions, 401-06 (3d ed. 1977). We suggest that in the future, district courts instruct juries along the lines recommended by Devitt & Blackmar, supra, §14.13, as follows:

> Intent ordinarily may not be proved directly, because there is no way of

---

trial read:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

> fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

AFFIRMED.

APPENDIX B

APPENDIX TO PETITIONER'S BRIEF
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

pleases.

THE COURT: And then you understand that after the instructions are given, you merely have to renew your exceptions that you gave heretofore and then add any others that you care to.

All right?

MR. GLASER: Fine.

THE COURT: Bring the Jury in.

COURT'S INSTRUCTION TO THE JURY

NORTHROP, C.J.:

THE COURT: Good morning, Members of the Jury. Is this mike on?

Now that you have heard the evidence and the argument, the time has come to instruct you as to the law governing this case.

Although you, as Jurors, are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn

duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been chosen and sworn as Jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the not guilty plea of the accused. You are to perform this duty without bias or prejudice as to any party.

The law does not permit Jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all of the evidence, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before you, the Jury, to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you, the Jurors, are satisfied beyond a reasonable doubt of the defendant's guilt from all of the evidence in the case.

A reasonable doubt is that kind of doubt that would make a reasonable person hesitate in the face of it to act in any matter of like importance relating to his own affairs. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely on and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, you, the Jurors, do not feel convinced to a moral certainty that the defendant is guilty of the charge.

An indictment, as I have told you before, is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

There are two types of evidence from which you may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, you, the Jury, be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

Statements and arguments of counsel are not evidence in the case. The evidence in

the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience. You are also to consider the stipulations in this case, and I think we agreed there are two, didn't we? What were -- one of them was --

MR. GLASER: There were two.

THE COURT: What?

MR. GLASER: There were two, but I forgot the first.

MR. BETTER: One was the one yesterday with respect to the transcript of the deposition, there was no reference to Mr. Schlein's discharge release during the course of the deposition.

The other had to do with a notation on the back of a check as to where it was deposited.

It's on the check anyway, so there's really no need for the stipulation.

THE COURT: All right. Those are the only two facts that you need not consider,

then. They are stipulated to by the parties.

An inference is a deduction or conclusion which reason and common sense would lead you to draw from facts which have been proved.

A presumption is a conclusion which the law requires you to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but, unless so outweighed, you, the Jury, are bound to find in accordance with the presumption.

For example, unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; and that the law has been obeyed.

It is the duty of the attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the Court has sustained an objection to a question, you are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, you, the Jurors, are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

Now, of course counsel approached the Bench at various times to discuss matters of law and the shoosher was put on, as you will

remember. Now, you are not to speculate as to what went on here at the Bench, nor are you to hold against the defendant or the prosecution the attorneys coming up here and making any remarks or any time that I might have called them down, which, of course, was not necessary. They are very capable and able lawyers and in any event, do not in any way put any onus on the defendant or the prosecution, because of the acts of those people who are here in Court representing in one instance the United States Government and in the other instance the defendant on trial.

You, as Jurors, are the sole Judges of the credibility of the witnesses and the weight their testimony deserves. Of course, the witnesses include the defendant, who testified in this case.

You are to judge whether or not the witness is speaking the truth by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and in every matter of evidence which tends to indicate whether the witness is worthy of belief, and also each witness's intelligence, motive, state of mind, and demeanor and manner while on the stand.

Consider also any relation each witness may bear to either side of the case, the manner in which each witness may be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by the evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony.

Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilfull falsehood.

All evidence of a witness whose self interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused should be considered with caution and weighed with great care.

A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony or by a conviction of a felony or a crime involving moral turpitude.

If you believe any witness has been impeached, and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars, and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.

The law of the United States permits the Judge to comment to the Jury on the evidence in the case. Such comments are only expressions of the Judge's opinion as to the facts;

and you may disregard them entirely, since you, the Jurors, are the sole Judges of the facts. If I intend to comment, I will let you know at that time so that you may judge it in the context of the instructions I just gave you.

You must remember that the defendant is not on trial for any act or conduct not alleged in the indictment. Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you, the Jury, should consider such evidence along with all the other evidence in the case.

Evidence that a defendant's reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, has not been discussed; or that those traits of the defendant's character have not been questioned, may be sufficient to warrant an inference of good reputation as to those traits of character.

The evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the Jury may think it impossible that a person of good character, in respect to those traits would commit such a crime.

You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

You have heard testimony from certain Government witnesses that they refused to be interviewed by investigators hired by the defendant. In this regard, I instruct you that there is no evidence that any postal

inspector acted improperly or unlawfully in this case.

A paper containing the formal accusations against the defendant has been drawn up in this case. It is called an indictment. The indictment, while it tells what the defendant is accused of, is not evidence against him, as I have already told you.

To judge the evidence, however, you need to know what the Government is trying to prove; therefore, I am going to read the pertinent parts of the indictment and instruct you on the law applicable to the statutory sections set forth in the indictment.

You will note that the indictment charges that the offense was committed on or about a certain date. It is not necessary that the proof establish with certainty the exact date of the alleged offense. It is sufficient if the evidence shows beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Now, I am going to read the first part of the indictment and then when I get down to the various charges, I'm just going to read the dates and then I'm going to give you the indictment so that you can take it in the Grand Jury room with you -- I mean in the Jury room with you, and you can go over it as you deliberate.

The Grand Jury for the District of Maryland charges:

At all times pertinent to this indictment, Pedro deBorja was a physician engaged in the practice of medicine in the Baltimore metropolitan area and the State of Maryland.

At all times pertinent to this indictment, Transit Casualty Company, Maryland Indemnity Insurance Company, Nationwide Insurance, Maryland Automobile Insurance Fund, Government Employees Insurance Company, Allstate Insurance Company, State Farm Insurance Company, were companies engaged in the business of providing automobile liability insurance to owners of motor vehicles in the State of Maryland which covered claims for property damage and bodily injury resulting from accidents involving insurance motor vehicles.

From a date unknown, but beginning prior to the 13th day of September, 1972, and continuing up to and including the date of this indictment, in the State and District of Maryland, Pedro deBorja, the defendant, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from the insurance companies named in paragraph two above, the defendant then well knowing that the pretenses, representations and promises were false and fraudulent when made.

4. It was part of the scheme -- this, incidentally, is preliminary to the indictment and part of the indictment, of course, and is embodied in the first count and lays the background for this, these are the charges which I will read later on, -- it was part of the scheme and artifice to defraud that the defendant associated himself with certain attorneys who represented persons claiming to have been injured in automobile accidents, hereinafter referred to as clients, caused by the negligence of others. In connection with the claims of the clients against the persons causing the accident and their insurance companies, the attorneys would

refer the clients to the defendant who would prepare and supply to the attorneys, false and fraudulent medical reports and bills, knowing that the attorneys would submit the false and fraudulent medical reports and bills to the insurance companies and would utilize said reports and bills as a basis for obtaining inflated monetary settlements for their clients from the insurance companies.

It was further part of the scheme and artifice to defraud that the defendant knowingly and wilfully falsified medical reports and bills by one or more of the following methods:

a.) The defendant prepared and submitted to certain attorneys, medical reports and bills for clients whom he had not examined or treated.

b.) The defendant inflated certain medical bills by including in the bills charges for medical services and treatment which visits, in truth and fact, had not been made.

c.) The defendant represented that certain medical services had been rendered to the clients when, in truth and fact, those medical services had not been rendered.

d.) The defendant falsified and fraudulently exaggerated the injuries purportedly sustained by certain clients.

e.) The defendant represented that he had supplied certain clients with medicines and prosthetic devices such as back braces, neck collars and sacroiliac belts when, in truth and fact, the medicines and prosthetic devices had not been supplied.

The defendant backdated the date on

which certain clients first visited his office for medical services and treatment in that he represented that medical services and treatment had been rendered commencing at a date closer to the accident than was true.

8. On or about September, -- now, this type of thing that I am now reading is the mailing situation -- on or about September 13, 1973, in the State and District of Maryland, Pedro deBorja, the defendant, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to the Association of Independent Taxi Operators, Inc., 1920 Ashburton Street, Baltimore, Maryland 21216.

Now, gentlemen, I'm going through the rest of the counts and just indicate the dates. Is that agreeable?

MR. BETTER: Yes, sir.

MR. GLASER: That's fine.

THE COURT: All right, then the next count, count two, is a mailing on or about September 15, 1972, and knowingly did cause to be delivered by mail, a letter to Gerald Klauber.

The next one is April 26th, 1973, and a letter mailed to Tom Baxter, Nationwide Insurance Company.

Count 4, July 16th, 1973, a letter, knowingly did cause to be delivered by mail a letter to Eugene Glazer.

Count 5 is April 18th, 1973, and delivered by mail, a letter addressed to Allstate

Insurance Company.

Count 6 is April 25th, 1973, caused a letter to be delivered, addressed to Herbert Rochlin, attorney.

Count 7, May 7, 1973, a mail - - a letter addressed to R. Hempting, B I G, and so forth, Washington Boulevard.

Count 8, June 15, 1973, a letter addressed to Morris Berman.

Count 9, May 29, 1973, a letter addressed to State Farm Mutual Insurance Company.

Count 10, June 29th, 1973, a letter addressed to Rochlin and Settleman, attorneys.

January 8th, 1973, -- now, let me say here, and I think I said it at the outset in reference to count 1, I'm just going to read this to remind you how these things read, on or about January 8th, 1973, in the State and District of Maryland, Pedro deBorja, the defendant, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to State Farm Mutual Automobile Insurance Company.

Count 12 reads in the same manner, January 17th, 1973 and the letter goes to Herbert Rochlin, an attorney.

Count 13, a letter was mailed again to Rochlin and Settleman on August 24th, 1973.

May 1st, 1975, Count 14, a letter delivered by mail, addressed to Allstate Insurance Company.

Count 15, May 9th, 1975 is the date, and

the letter was mailed to Rochlin and Settleman, attorneys.

Count 16, November 5th, 1973, a letter to the Maryland Automobile Insurance Fund, that's the unsatisfied claim and judgment fund, you'll remember.

Count 17, March 22nd, 1974, a letter in the same manner, of course, was delivered, addressed to Barry R. Glaser, attorney at law.

Count 18, July 14, 1973, a letter was mailed to Joe Cook of Nationwide.

Count 19, December 19, 1973, a letter mailed to Morris Berman, an attorney at law.

Count 20, October 4, 1973, a letter was mailed addressed to Burton Mezick, claims examiner, GEICO, which is the Government insurance company, as you will remember.

Count 21, February 21st, 1974, a letter was mailed to Eugene Glazer, an attorney, as you will remember.

Count 22, February 28th, 1974, a letter was mailed to Ms. Ellen Lindley, Maryland Automobile Insurance Fund.

Count 23, and the last count, March -- and the mailing was March 6th, 1974, and the letter was addressed to Barry Glazer, attorney.

Now, the section to which all of these refer is known as Article 18, Section 1341 of the United States Code which is, of course, an enactment of the Congress of the United States and really why you are in this Court, because it happens to be United States law, and in pertinent part, it reads as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, for the purpose of executing such scheme or artifice, or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service, or knowingly causes to be delivered by mail according to the direction thereon, or at a place at which it is directed to be delivered by the person to whom it is addressed, any such thing or matter, shall be guilty of a violation of the laws of the United States.

The gist of the offense charged in each of the 23 counts here, is causing the misuse of the United States mails in carrying out or attempting to carry out a scheme to defraud as charged, and not merely the scheme itself. The use of the mails is an essential element of each count.

Although the use of the United States mails in furtherance of a scheme to defraud is an essential element of the offense charged, it is not necessary that the use of the mails by the defendant himself be contemplated, nor is it necessary that the defendant do any actual mailing himself, or that he specifically intend that the mails be used. It is sufficient if the mails were, in fact, used to carry out the scheme, and if the defendant knew or could reasonably foresee that the mails would be used in furtherance of the scheme.

Thus, the defendant may not avoid responsibility by claiming that he himself did not use the mails.

Where one does an act with knowledge that the use of mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not intended, then such person causes the mails to be used within the meaning of the statute.

Three essential elements are required to be proved in order to establish each of the offenses charged in the indictments:

First: The act or acts of having devised, or having intended to devise, a scheme or artifice to defraud or to attempt to defraud, certain insurance companies, associations and corporations out of money or property by means of false or fraudulent representations as to bills or medical reports, as charged in the indictment.

Second: The act or acts of the defendant, causing to be delivered by mail, according to the direction thereon, certain letters, documents or other materials to carry out some essential step in the execution of said scheme or artifice to defraud, or to attempt to do so, as charged in the indictment.

Third: So acting and causing the mails to be used wilfully and knowingly or with reasonable foreseeability that the mails would be used, with the specific intent to carry out some essential step in the execution of said scheme or artifice to defraud, or attempt to do so, as charged.

The words scheme and artifice as used in the Statute just read, include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived.

A statement or representation is false or fraudulent within the meaning of this statute, if known to be untrue, or made with reckless indifference as to its truth or falsity, and made or caused to be made with the intent to deceive.

A false or fraudulent representation may be made by statements of half truths or the concealment of material facts, as well as by affirmative statements or acts.

Fraudulent intent is one of the essential elements of the offenses with which the defendand is charged. Fraudulent intent is not presumed or assumed; it is personal and not imputed. One is chargeable with his own personal intent, not the intent of some other person. Bad faith is an essential element of fraudulent intent. Good faith constitutes a complete defense to one charged with an offense of which fraudulent intent is an essential element. One who acts with honest intention is not chargeable with fraudulent intent. One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent, even though such opinion is erroneous and such belief is a mistaken belief. Evidence which established only that a person made a mistake in judgment or an error in management or was careless, does not establish fraudulent intent. In order to establish fraudulent intent on the part of a person, it must be established that such person knowingly and intentionally attempted to deceive another. One who knowingly and intentionally deceives another is chargeable with fraudulent intent notwithstanding the manner and form in which the deception was attempted.

In every crime there must exist a union of joint operation of act, or failure to act,

and intent.

The burden is always upon the prosecution to prove both act, or failure to act, and intent beyond a reasonable doubt.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the Jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done or omitted.

An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or some other innocent reason. The purpose of the word knowingly in the statute was to insure that no one would be convicted for an act done because of mistake, accident, or innocent reason.

Like intent, knowledge ordinarily may

not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a defendant's knowledge from the surrounding circumstances. You may consider any statement made and done or omitted by the defendand, and all other facts and circumstances in evidence which indicate his state of mind.

Where, as here, knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if it is proved that the defendant is aware of a high probability of its existence, unless he actually believes that it does not exist.

With respect to an offense such as charged in this case, specific intent must be proved beyond reasonable doubt before there can be a conviction.

An act is done wilfully if it is done voluntarily and intentionally, and with the specific intent to do something that the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose to disobey or to disregard the law, may be found to act with specific intent.

An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertance or other innocent reason.

To act with intent to defraud means to act knowingly and wilfully and with the specific intent to deceive ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self or others.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement or act made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate to you his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

It is not necessary that the Government prove all of the pretenses, representations and acts charged in the indictment. It is essential only that one or more of them be proved to show the existence of the scheme.

But in order to find the defendant guilty as charged in any count of the indictment, the Government must also show that the particular use of the mails charged was undertaken in furtherance of, or as an integral part of, the scheme.

The proof need not establish that as part of the scheme or artifice a bill or medical report was misrepresented or overstated in any particular amount or manner.

It is sufficient if the evidence in the case establishes beyond a reasonable doubt that a bill or medical report was knowingly misrepresented or overstated in some substan-

tial amount or in some substantial material manner.

The use of the United States mails in furtherance of the scheme to defraud is an essential element of the offense charged, as I have already said. It is not necessary that the use of the mails by the participants themselves be contemplated or that the defendant do any actual mailing, or specifically intend that the mails be used. It is sufficient if the mails were in fact used to carry out the scheme, and if the defendant knew or could reasonably foresee that the mails would be used in furtherance of or as a consequence of the scheme.

That a particular matter was transmitted through the United States mails may be shown by direct evidence that there was a placing in the mails or direct evidence of a taking from the mails, or it may be shown by circumstantial evidence through proof of customs, useages and practices in the course of business which convinces you beyond a reasonable doubt that the particular letter was transmitted through the United States mails as charged by the indictment.

The letter, document or other material mailed need not itself disclose any intent to defraud, nor show on its face that it was mailed in furtherance of a scheme to defraud. But is necessary that the evidence in the case establish beyond a reasonable doubt that the letter was knowingly caused to be mailed, by the defendant, with the intent to help carry out some essential steps in the execution of the scheme to defruad as alleged in the indictment.

It is not necessary to show that any company, or person, association or corporation was in fact, defrauded or sustained any loss or that the defendant received any money or property or that the defendant profited from the scheme. Proof that a company, association or a corporation was in fact defrauded, or the failure of the evidence to show that one was defrauded, may, however, be considered by you on the question of whether the defendant devised or intended to devise a scheme or artifice to defraud. The question is not whether somebody has in fact been defrauded, but whether the defendant, Pedro deBorja, intended to defraud. If he intended to defraud by a plan or scheme, it is not important whether he accomplished it or not.

Under the mail fraud statute, each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act was or is a violation of law or that the defendant acted with any Federal law in mind.

As a general rule, whatever any person is legally capable of doing himself, he can do through another as his agent. So, if the acts or conduct of an employee or other agent are wilfully ordered or directed or wilfully authorized, or consented to by the accused, then the law holds the accused responsible for such acts or conduct the same as if personally done by the accused.

The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

Section 2 of Title 18, U.S.C., provides,

and this you will see on the bottom of each count. Let me see. Yes, just a reference to it. Now, you won't see any language in reference to that, but this is part of the indictment.

Section 2 of Title 18 provides:

Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

Whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

In other words, every person who wilfully participates in the commission of a crime may be found to be guilty of that offense. Participation is wilfull if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

In order to aid and abet another to commit a crime, it is necessary that the accused wilfully associate himself in some way with the criminal venture, and wilfully participate in it as he would in something he wishes to bring about; that is to say, that he wilfully seek by some act or omission of his to make the criminal venture succeed.

An act or omission is wilfully done, as I have said over and over again, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to

do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

You, of course, may not find the defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

In order to cause another person to commit a criminal act, it is necessary that the accused wilfully do, or wilfully fail to do, something which, in the ordinary performance of official duty, or in the ordinary course of the business or employment of such person, or by reason of the ordinary course of nature or the ordinary habits of life results in the other person's either doing something the law forbids, or failing to do something the law requires to be done.

An act or a failure to act is wilfully done, if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to do something the law requires to be done; that is to say, with a bad purpose to either disobey or to disregard the law.

Now, the punishment provided by the law for the offenses charged in the indictment is a matter exclusively within the province of the Court, and is not to be considered by you, the Jury, in arriving at an impartial verdict as to the guilt or innocence of the accused.

There is nothing peculiarly different in the way a Jury is to consider the proof in a criminal case from that in which all reasonable persons treat any questions

depending upon evidence presented to them. You are expected to use your good common sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

You are to perform your duty without bias or prejudice in that the law does not permit justice to be governed by sympathy, prejudice or public opinion.

If the accused be proved guilty, say so. If not proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

I must remind you that, when you have retired to your Jury room to deliberate upon this case, it is your duty to commence your deliberations under the general presumption that the defendant is innocent, and this presumption persists in the defendant's favor until you are convinced by the evidence, beyond a reasonable doubt, that the defendant is guilty.

You should not take the testimony of the prosecution alone, and, then, if that testimony indicates guilt, take up the testimony of the defense to ascertain where the defendant has proved himself to be not guilty.

Rather, you should reserve your opinion upon the question of guilt or innocence until you have considered all of the evidence, not only that given for the prosecution, but also that given for the defense.

The question for you, the Jury, to determine is, considering all of the evidence in the case, has the defendant been proved guilty beyond a reasonable doubt? You must make this determination as to each count of the indictment, of which there are 23.

The burden of proof, I remind you again, is upon the Government to prove that the defendant is guilty beyond a reasonable doubt as to each count in order to find the defendant guilty of that count.

Your verdict must represent the considered judgment of each Juror. In order to return a verdict, it is necessary that each Juror agree thereto. Your verdict must be unanimous.

It is your duty, as Jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow Jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow Jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in this case.

As you have noted, a separate offense is charged in each of the counts of the indictment. Each offense and the evidence applicable

thereto should be considered separately.

The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged.

Upon retiring to the Jury room, Juror number one, Mr. Thomas Cammack, will act as your foreman. He will preside over your deliberations and will be your spokesman in Court.

When you have reached a unanimous agreement as to your verdict, please notify the bailiff and you will return to the Courtroom with your verdict as to each of the 23 counts.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. Never attempt to communicate with the Court except in writing.

And bear in mind always that you are not to reveal to the Court or to any person how you, the Jury, stands, numerically or otherwise on the question of guilt or innocence of the accused, until after you have reached a unanimous verdict.

All right, gentlemen, you may approach the Bench.

I might say this, when you return to the Courtroom with your verdict, the Clerk will ask who shall speak for you and you will say, our foreman, and then your foreman, Mr. Cammack, will rise, and when asked to do so, will state your verdict. Okay, gentlemen.

THE REPORTER: Yes, sir.

THE COURT: Now, we would also like to hear the Judge's instructions on intent and reasonable doubt, or have a written copy of those instructions.

Now, I am going to read the instructions that I gave, and in reading them to you, I am going to caution you not to -- to remember that the other instructions are equally important in this case. Just don't highlight these as the one thing.

I guess you want your recollection refreshed as to these, but remember that you are to consider the instructions as a whole. Okay?

All right, now I am going to read the reasonable doubt one, first.

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the Jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you, the Jurors, are satisfied beyond a reasonable doubt of the defendant's guilt from all of the evidence in the case.

A reasonable doubt is that kind of doubt that would make a reasonable person hesitate in the face of it to act in any matter of like importance relating to his own affairs. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere

suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution.

The law does not impose upon the defendant the duty of producing any evidence. A reasonable doubt exists in any case when, after careful and impartial consideration of all of the evidence, you, the Jurors, do not feel convinced to a moral certainty that a defendant is guilty of the charge.

All right. That is the charge as to reasonable doubt.

All right. Now, there are several charges in reference to intent.

Fraudulent intent is one of the essential elements of the offenses with which the defendant is charged. Fraudulent intent is not presumed or assumed; it is personal and not imputed. One is chargeable with his own personal intent, not the intent of some other person. Bad faith is an essential element of fraudulent intent. Good faith constitutes a complete defense to one charged with an offense of which fraudulent intent in an essential element.

One who acts with honest intention is not chargeable with fraudulent intent. One who expresses an opinion honestly held by

him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though such opinion is erroneous and such belief is a mistaken belief. Evidence which establishes only that a person made a mistake in judgment or an error in management or was careless does not establish fraudulent intent.

In order to establish fraudulent intent on the part of a person, it must be established that such a person knowingly and intentionally attempted to deceive another. One who knowingly and intentionally deceives another is chargeable with fraudulent intent, notwithstanding the manner and form in which the deception was attempted.

All right. Now, in every crime there must exist a union or joint operation of act, or failure to act, and intent.

The burden is always upon the prosecution to prove both act, or failure to act, and intent beyond a reasonable doubt.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, you, the Jury, may draw the inference that the accused intended all of the consequences which one standing in

like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only the the state of mind with which the act is done or omitted.

Now, an act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or some other innocent reason.

And then there is more words in describing knowingly. Do you wish me to read that one, too?

With respect to an offense such as charged in this case, specific intent must be proved beyond reasonable doubt before there can be a conviction.

I will go on. The purpose of adding the word knowingly to the Statute was to insure that no one would be convicted for an act done because of mistake, accident or innocent reason.

Like intent, knowledge ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a defendant's knowledge from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

Where, as here, knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if it is proved that the defendant is

aware of a high probability of its existence, unless he actually believes that it does not exist.

With respect to an offense such as charged in this case, specific intent must be proved beyond a reasonable doubt before there can be a conviction.

An act is done wilfully if it is done voluntarily and intentionally and with the specific intent to do something that the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent.

An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

To act with intent to defraud means to act knowingly and wilfully and with the specific intent to deceive, ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self or others.

Intent ordinarily may not be proved directly, because there is not way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances.

You may consider any statement or act made and done or omitted by the defendant, and all other facts and circumstances in which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

The use of the United States mails in furtherance of the scheme to defraud is an essential element of the offense charged. It is not necessary that the use of the mails by the participants themselves be contemplated or that the defendant do any actual mailing, or specifically intend that the mails be used. It is sufficient if the mails were in fact used to carry out the scheme, and if the defendant knew or could reasonably foresee that the mails would be used in furtherance of, or as a consequence of the scheme.

Now, I don't -- is that sufficient?

THE FOREMAN: Uh-huh. I think so.

THE COURT: I don't see where any more should be used. Do you?

(Discussion off the record at the Bench.)

THE COURT: It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act was or is a violation of law or that the defendant acted with any federal law in mind.

(Discussion off the record at the Bench.)

THE COURT: Do you wish any more on intent?

THE FOREMAN: No, that's sufficient.

THE COURT: Or have I confused you?

THE FOREMAN: You told us what we wanted to know.

THE COURT: Sir?

THE FOREMAN: You have told us what we wanted to know.

THE COURT: Okay. Thank you, gentlemen. Ladies and gentlemen.

THE BAILIFF: Please rise, the Honorable Court now stands recessed until the return of the Jury.